No. 79696-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROSE DAVIS, as the Personal Representative of the Estate of Renee L. Davis, deceased,

Plaintiff-Appellant,

v.

KING COUNTY, *et al.*,

Defendants-Appellees.

MOTION FOR RECONSIDERATION AND PUBLICATION

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I. IDENTITY OF PETITIONER

Rose Davis, Personal Representative for the Estate of her deceased sister, Renee Davis, Plaintiff in the trial court and Appellant here, is the movant.

II. STATEMENT OF RELIEF SOUGHT

The Court affirmed summary judgment in favor of Defendant King County, holding that Ms. Davis' claims were barred by RCW 4.24.420. Ms. Davis seeks reconsideration of that decision pursuant to RAP 12.4, because the Court overlooked and misapprehended the law. Ms. Davis also moves pursuant to RAP 12.3(e) to publish the Court's Opinion.

III. FACTS RELEVANT TO THIS MOTION

The relevant facts are included in the content of the Court's Opinion and of the parties' briefs and arguments.

IV. EVIDENTIARY BASIS

On January 3, 2018, Ms. Davis filed suit in King County Superior Court for negligence, battery, and outrage. Shortly thereafter, King County moved for summary judgment seeking to dismiss all of Ms. Davis' claims, based primarily on RCW 4.24.420, submitting that Renee was guilty of Second- or Third-Degree Assault.

The trial court granted King County's motion solely on the basis of RCW 4.24.420. CP at 524. The trial court observed that "this case illustrates in a number of respects some issues that you can tell I find somewhat troubling in terms of holes or gaps in the law." RP at 53. The trial court also explained that it was "troubled by the fact that RCW 4.24.420 by its terms forecloses any inquiry into [any] responsibility that the deputies or the county may have had." *Id.* at 54. The trial court specifically noted that issues regarding the reasonableness of the Deputies' conduct were present, which are reserved exclusively "for the trier of fact" to determine. *Id.* at 55. The trial court concluded by explaining "if a court is going to make new law in this issue, it should be in an appellate court, not a Superior Court." *Id.*

This Court affirmed the trial court's order, concluding that because "[t]he act of pointing a gun at someone supports a determination that there was an intent to create apprehension of bodily injury . . . there was not a dispute of material fact about whether Davis formed the requisite intent to find that she was engaged in the commission of a felony at the time of her death." Appendix, at 8-9.

This Court also held that "[s]ince the estate was unable to present any evidence to create a dispute of material fact as to whether Davis pointed her gun at the deputies, there is no dispute of material fact on the issue of causation under RCW 4.24.420." *Id.*, at 14-15.

In addition, this Court issued the following rebuke of its own application of RCW 4.24.420:

> [W]e acknowledge that Davis's death is tragic and echo the trial court's sentiment that the application of RCW 4.24.420 here is problematic because it precludes claims where law enforcement officers' actions and training may have been unreasonable, given their knowledge that the individual they were confronting was suicidal and armed.

Id., at 7.

IV. MOTION FOR RECONSIDERATION

A. THE COURT'S DECISION CONFLICTS WITH DECISIONS OF THE U.S. SUPREME COURT, WASHINGTON STATE SUPREME COURT, AND COURT OF APPEALS.

While it is true that "[t]he act of pointing a gun at someone supports a determination that there was an intent to create apprehension of bodily injury," Appendix, at 8, it has been clearly established for decades that "[h]owever clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, **the question of intent can never be ruled**

as a question of law, but must always be submitted to the jury." *Morrissette v. United States*, 342 U.S. 246, 274 (1952) (emphasis added); *see also Chasson v. Ponte*, 459 U.S. 1162, 1164, 103 S. Ct. 805, 806 (1983) (same).

The Washington State Supreme Court is in accord. *See Wingert v. Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 849, 50 P.3d 256, 260 (2002) ("[A] statute's requirement that the [person] act willfully and with intent presents a question of fact . . . ."); *Matter of Estate of Little*, 106 Wash. 2d 269, 288, 721 P.2d 950, 960 (1986) ("The existence or absence of . . . intent is a factual issue to be resolved by the trier of the fact.").

Division II of the Court of Appeals, in published decisions, has held likewise, thus creating a split between Divisions One and Two were the Court to fail to reconsider its decision. *See Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wash. App. 252, 290, 337 P.3d 328, 345 (2014) ("[I]ntent is a question of fact . . . ."); *Bersos v. Cape George Colony Club*, 4 Wash. App. 663, 665, 484 P.2d 485, 487 (1971) ("Intent is preeminently a question of fact.").

1. Other State and Federal Jurisdictions Are in Accord.

Numerous other state jurisdictions also follow the rule that "[w]here intent of the accused is an element of the crime charged, its existence is a question of fact for the jury. The question of intent cannot be ruled upon as a matter of law." *State v. Howe*, 247 N.W.2d 647, 655 (N.D. 1976); *see also Pratt v. State*, 492 N.E.2d 300, 302 (Ind. 1986) ("[W]hether or not [a defendant]'s intoxication prevented him from forming the requisite *mens rea* was a question of fact . . . ."); *Shackelford v. State*, 486 N.E.2d 1014, 1017 (Ind. 1986) ("Whether appellant's voluntary intoxication was sufficient to preclude the formulation of the requisite *mens rea* is a question of fact for the jury."); *Rush v. Alaska Mortgage Group*, 937 P.2d 647, 651 (Alaska 1997) (same).

U.S. District Courts have likewise universally held that "[w]hether a party formed the adequate *mens rea* is a question of fact that cannot be decided [as a matter of law]." *Greenbank v. Great Am. Assurance Co.*, No. 18-0239, 2019 WL 4542690, at *7 (S.D. Ind. Sept. 19, 2019) (unpublished); *see also Peterson v. Port of Benton Cty.*, No. 17-0191, 2019 WL 1299373, at *6 (E.D. Wash. Mar. 21, 2019) (unpublished) ("Whether the defendant acted with

retaliatory intent is a question of fact . . . .") (quotation omitted); *Cincinnati Ins. Co. v. Orten*, No. 17-0036, 2019 WL 6895980, at *6 (M.D. Tenn. Feb. 5, 2019) (unpublished) ("*Mens rea* is a question of fact properly decided by a criminal jury."); *Prudential Ins. Co. of Am. v. Govel*, No. 16-0297, 2017 WL 2455106, at *8 (N.D.N.Y. June 6, 2017) (unpublished) ("[T]he question whether a defendant possessed a 'reckless' *mens rea* is a question of fact properly left to the trier of fact . . . .") (quotation omitted); *Whitney Info. Network, Inc. v. Weiss*, No. 06-6569, 2008 WL 731024, at *7 (E.D.N.Y. Mar. 18, 2008) (unpublished) ("[T]he nature and extent of Defendant's *mens rea* is a question of fact not appropriate for disposition under Rule 12(b)(6).").

2. Application of the Rule That Intent Can Never Be Determined as a Question of Law to RCW 4.24.420

That the question of intent can never be determined as a question of law does not mean, of course, that RCW 4.24.420 cannot apply where the underlying alleged felony contains a specific intent element. Juries can be instructed on the statute and have been since the statute's inception. *See* WPI 16.01. The Court was thus correct that "[t]he plain language of the statute does not require that a person be convicted of a felony or admit to felonious conduct before RCW

4.24.420 is a complete defense to a civil action." Appendix, at 11. But absent a conviction or an admission, the defense is simply unavailable *at the summary judgment* stage.

The Court properly held that "'[s]pecific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree.'" Appendix, at 8 (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 369 (1995)). The Court's decision that Renee's intent must be inferred as a matter of law because she allegedly pointed a gun at the Deputies, however, was in error. At summary judgment, the court must "consider all facts and reasonable inferences in the light most favorable to the nonmoving party." *Specialty Asphalt & Constr. v. Lincoln Cty.*, 191 Wash. 2d 182, 191, 421 P.3d 925, 931 (2018). And even assuming that Renee did point a gun, under clearly established U.S. Supreme Court, Washington State Supreme Court, and Washington State Courts of Appeals' precedent—as well as persuasive precedent from numerous other jurisdictions—whether Renee *intended* to create apprehension of bodily harm was a pure question of fact for the jury.

B. THE COURT'S DECISION OVERLOOKED AN ISSUE OF FACT.

The proper role of the courts is to safeguard the rights of individuals by construing the statutory grants of immunity strictly, "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a); *Plano v. City of Renton*, 103 Wash. App. 910, 911, 14 P.3d 871, 873 (2000) (citing *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 437-38, 824 P.2d 541 (1992)). Here, with respect, the Court did the opposite.

Unfortunately, the fatal shooting of Renee by law enforcement does not come as a surprise. She was only one of 962 fatally shot by law enforcement officers in 2016,[1] a disproportionate number of which were black or brown.[2] Of this disproportionately minority subgroup, Native Americans like Renee are killed in police encounters at a higher rate than any other racial or ethnic group.[3]

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[1] *Police Shootings 2016 Database*, Washington Post, https://www.washingtonpost.com/graphics/national/police-shootings-2016 (accessed Sept. 14, 2020).

[2] Lynne Peeples, *What the Data Say about Police Shootings*, Nature, Sept. 5, 2019, *available at* https://www.scientificamerican.com/article/what-the-data-say-about-police-shootings.

[3] Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN, Nov. 13, 2017, *available at* https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html. They also suffer from significantly higher rates of mental health problems and substance abuse disorder than do any other ethnic/racial group. American Psychiatric Association, Mental Health Disparities: American Indians and Alaska Natives (2017), *available at*

Although police officers are often asked to make split-second decisions, we expect them to act at all times with respect for the dignity and worth of black and brown life. At present, that does not always happen. As the Fourth Circuit explained just last month: "This has to stop." *Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020).

This type of "'they said, [s]he's dead' case" has thus been rejected by an increasing number of federal courts because it is unjust, inequitable, and stifles the role of the community in gauging the credibility of officers who they entrust to use deadly force. *Briscoe*, 2020 WL 5203588, at *1 (quoting *Cruz*, 765 F.3d at 1077); *see also Wallisa v. City of Hesparia*, 369 F. Supp. 3d 990, 1006 (C.D. Cal. 2019) ("[I]n cases such as this, in which the officer defendants are the only surviving eyewitnesses, the court may not simply accept what may be a self-serving account by the police officers.") (quotation omitted); *e.g., Risher v. City of Los Angeles*, No. 17-995, 2020 WL 5377306, at *12 (C.D. Cal. July 29, 2020) (unpublished). This Court should do the same.

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https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-American-Indian-Alaska-Natives.pdf

V. MOTION FOR PUBLICATION

A. GROUNDS FOR RELIEF AND ARGUMENT

RAP 12.3(e) authorizes the Court to order publication of an opinion the Court previously filed for public record, but which originally was designated as unpublished. RAP 12.3(e) requires that the moving party support the motion with reasons justifying publication, by addressing the 6 criteria set forth within that rule.

The Legislature also has provided some guidance. RCW 2.06.040 states in pertinent part that "All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court." As explained below, it is Respondent's position that the Court's decision herein does have sufficient precedential value to be published.

1. If Not A Party, the Applicant's Interest

The Applicant, Ms. Davis, is a party.

2. Applicant's Reasons For Believing That Publication Is Necessary

A primary purpose of publishing decisions is to educate the bar and the trial bench on the law. This ongoing educational process makes the justice system fairer, more predictable, and more

efficient. It also should tend to reduce the workload of the appellate courts—lawyers usually will not make arguments contrary to established precedent, and when they do make such arguments, trial judges ordinarily will reject such arguments and will follow the established law.

In this case, King County asserted that RCW 4.24.420 was a complete bar to recovery. In the last few years, law enforcement defendants have increasingly invoked RCW 4.24.420 to foreclose fact finding when the victim is deceased and therefore cannot rebut the assertions made about allegedly "pointed" guns and so-called "furtive movements." *See, e.g., Watness v. City of Seattle*, No. 17-2-23731-1 SEA, 2019 WL 5491444 (Wash. Super. Jan. 22, 2019); *Briscoe v. City of Seattle*, No. 18-262, 2020 WL 5203588 (W.D. Wash. Sept. 1, 2020) (unpublished); *Elliott v. Mason Cty.*, No. 17-6067, 2019 WL 3890973, at *6 (W.D. Wash. Jan. 28, 2019) (unpublished).

It is important for decedents' families, attorneys, trial courts, and the other appellate courts of this state to know that RCW 4.24.420 is a complete bar to these cases, even where intent is an element of the underlying alleged felony. *Cf. Morrissette*, 342 U.S. at 274. Publishing at least that portion of this decision would bring

this Court's ruling into this State's common law, where it would be appreciated by the bench and bar.

In addition, publishing this decision would fortify the Division split that it creates, discussed above, thereby raising the likelihood that the state Supreme Court will take the opportunity to cure the discord.

3. Whether the Decision Determines an Unsettled or New Question of Law or Constitutional Principle.

The decision determines a new question of law. RCW 4.24.420 has never been invoked at the summary judgment stage when the underlying alleged felony has a specific element of intent and the Plaintiff has not admitted to or been convicted of the alleged felony.

4. Whether the Decision Modifies, Clarifies, or Reverses an Established Principle of Law

As discussed above, the decision reverses the established principle that "the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *Morrissette*, 342 U.S. at 274.

5. Whether the Decision is of General Public Interest or Importance

Renee's death was by no means an anomaly, as discussed

above, but it has garnered national[4] and even international public interest.[5] Should it stand, the Court's interpretation of RCW 4.24.420 will enable persons entrusted with the state's greatest power to avoid accountability simply by giving a completely unverifiable, after-the-fact, self-serving, exculpatory statement of events. The public has a significant interest in the decision.

6. Whether the Decision is in Conflict with a Prior Opinion of the Court of Appeals.

In *Mitchell Int'l Enterprises v. Daly*, Division One of the Court of Appeals held that "[t]he existence of intent is a question of fact for the jury." 33 Wash. App. 562, 566, 656 P.2d 1113, 1116 (1983). As discussed above, Division Two has held likewise. *Wingert*, 146 Wash. 2d at 849, 50 P.3d at 260; *Little*, 106 Wash. 2d at 288, 721 P.2d at 960. The Court's decision is in conflict with these prior opinions of the Court of Appeals.

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[4] Shantell E. Jamison, *Washington Deputies Fatally Shoot Pregnant Mother of 3*, Ebony, Oct. 24, 2016, *available at* https://www.ebony.com/news/pregnant-mother-police-shooting.

[5] Justin Carissimo, *Pregnant Woman Shot and Killed by Police on Wellness Check*, The Independent, Oct. 24, 2016, *available at* https://www.independent.co.uk/news/world/americas/pregnant-woman-shot-and-killed-police-wellness-check-a7378316.html.

V. CONCLUSION

Earlier this year, the U.S. Supreme Court explained something true about wearing the robe: "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408, 206 L. Ed. 2d 583 (2020). The Washington State Supreme Court, too, has courageously recognized that in the context of racialized policing, "even the most venerable precedent must be struck down when it is incorrect and harmful."[6] Here, Ms. Davis asks nothing less.

The Court should Reconsider. Its decision is contrary to every single Supreme and Appellate Court to have analyzed the issue. It also overlooked an issue of fact.

The Court should also publish its decision. Publishing at least that portion of this decision would bring this Court's

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[6] Washington State Supreme Court, *Letter to Members of the Judiciary and the Legal Community*, Jun. 4, 2020, *available at* http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

unprecedented ruling into this State's common law, where it would be appreciated by the bench and bar.

Respectfully submitted this 20th day of September, 2019.

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CERTIFICATE OF SERVICE

I , Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I served the foregoing document, via email on the following parties:

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The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, on September 20, 2020.

s/Wendy Foster
Wendy Foster

No. 79696-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROSE DAVIS, as the Personal Representative of the Estate of Renee L. Davis, deceased,

Plaintiff-Appellant,

v.

KING COUNTY, *et al.*,

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APPENDIX

GABRIEL S. GALANDA, WSBA #30331
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROSE DAVIS as Personal Representative of the Estate of RENEE L. DAVIS, deceased, Appellant, v. KING COUNTY, a political subdivision of the State of Washington, TIMOTHY LEWIS, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; NICHOLAS PRITCHETT, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; JOHN URQUHART, in his individual capacity; MITZI JOHANKNECHT, Sheriff, King County Sheriff's Office, in her official capacity; JOHN DOES 1-10, individually and in their official capacities acting under the color of state law, Respondents.	No. 79696-8-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Washington's felony bar statute, RCW 4.24.420, creates a complete defense to any action for damages for personal injury or wrongful death if the person injured or killed was engaged in the commission of a felony at the time of the

injury or death and the felony was a proximate cause of the injury or death. On its face, the statute applies even if the defendant was negligent or unreasonable.

The estate of Renee Davis appeals the trial court's summary judgment order dismissing its wrongful death action. Davis was fatally shot by law enforcement during a mental health crisis where she was suicidal. On appeal, the estate contends that the trial court erred in granting the defendants' summary judgment motions because the court improperly inferred Davis's specific intent to assault the deputies, made credibility determinations about the deputies' version of events, and because issues of material fact exist as to whether the defendants' negligence was the proximate cause of Davis's death. The estate also contends that the trial court erred because the felony bar statute requires a criminal conviction or admission to felonious conduct before it can bar a wrongful death action. We affirm.

I.

On October 21, 2016, T.J. Molina approached King County Sheriff's Office Deputy Nicholas Pritchett on the powwow grounds at the Muckleshoot Indian Reservation during his patrol shift.[1] Molina was worried about his girlfriend, Davis, who had been sending him concerning text messages.

At 6:21 p.m., Davis sent Molina a text message saying "[w]ell come and get the girls or call 911 I'm going to shoot myself." Another text message followed at 6:28 p.m. that said "[t]his is to show you I'm not lying," with a blurry photo that appeared to be an injury. It was unclear from the photo the severity and location of the potential injury.

[1] Davis was a member of the Muckleshoot Indian Tribe. It is common for residents of the Reservation to seek out law enforcement officers for help rather than call 911.

Molina sought out Pritchett's help because Davis had two of her three children with her and was also pregnant with a fourth child. Pritchett was familiar with both Davis and Molina because he had responded to domestic violence incidents at Davis's home concerning Davis's ex-boyfriend. Molina showed Pritchett the text messages from Davis. Pritchett thought the picture could have been an injury or a "photo off the internet," but because the image was blurry, he could not be sure. Molina told Pritchett that Davis had access to a rifle and a handgun.

Pritchett advised dispatch of a "suicidal female, possibly armed with a rifle and who has her two children with her," texting "pictures of fresh injuries, unsure who is injured," and "female is Davis, Renee possibly born in 1993" at 6:37 p.m. Pritchett indicated that he would conduct a welfare check. Dispatch advised Pritchett that backup was approximately 26 minutes away. Pritchett asked dispatch to check if any units from the Auburn Police Department were available to respond. At the same time, Deputy Lewis was commuting home when he overheard Pritchett's radio transmissions and responded. Lewis had been attending a firearms training at the King County Sheriff's Office range.

Pritchett parked a few blocks away from Davis's home at 6:44 p.m. Pritchett approached the home on foot to survey the area and look for signs of distress. Pritchett returned to his vehicle to wait for backup. Lewis arrived at approximately 6:45 p.m. Pritchett quickly told Lewis about a tree he observed outside Davis's residence where they could shelter if there was gunfire. Lewis knew only what he heard over the radio and did not know that Davis was pregnant or that Pritchett had prior contacts with Davis.

Together, the deputies approached Davis's house on foot at approximately 6:52 p.m. Neither heard any noise from the house or indication that the occupants were in distress. Both deputies loudly knocked on the front door, siding, and windows of the house. They repeatedly yelled "Sheriff's Office!" "It's the police!" and "Come to the door!" to get Davis's attention. Lewis tried to remove the screen from the window when he saw Davis's two children in the living room and asked them to open the front door; Davis's three-year-old child complied. Both children appeared to be under the age of five.

The deputies entered the home, Lewis had his weapon drawn. After quickly assessing the children's well-being, Lewis moved the children to the front door foyer while Pritchett checked the living room and kitchen area. Lewis asked the children "Where's mommy's room?" and one of the children pointed to a door down the hallway. Lewis covered the hallway and the two bedrooms at the back of the hallway while Pritchett approached the first bedroom. The doorknob had a child safety device on it, and Pritchett was unable to maneuver the device because he had on gloves. Pritchett kicked the child safety device off the doorknob.

The deputies entered Davis's bedroom and observed her lying in her bed, covered in a blanket up to her neck, staring blankly at the door. The deputies instructed Davis to show her hands; Lewis recalled that Davis did not respond, while Pritchett recalled that Davis said "no." Lewis pointed his weapon at Davis while Pritchett pulled the blanket off Davis. Both deputies saw a gun, Lewis recalled that Davis's right hand was over the top of or below the gun, with the muzzle facing the foot of the bed, while Pritchett recalled that the gun was in Davis's right hand resting on her legs. Both

deputies observed a magazine in Davis's left hand, but could not tell whether the gun was loaded or unloaded.

Lewis ordered Davis to "drop the gun," while Pritchett yelled "gun." Pritchett attempted to move back toward the door. Both officers testified that she raised the gun and pointed it directly at them. Both Lewis and Pritchett fired their weapons. Three bullets hit Davis. Pritchett announced "shots fired" over the air. Davis slumped over, fell off the bed, and stated that the gun was not loaded.

Lewis heard the children screaming and left Pritchett alone in the bedroom with Davis. Lewis encountered Auburn Police Officer, Derek Pederson, as he took the children outside. After removing the children from the home, Pederson and Lewis went back to Davis's bedroom. Pederson recalled seeing Davis's gun in her hand while she was on the floor, while Pritchett recalled putting the gun in his utility belt as Lewis reentered the bedroom. Pedersen moved the bed away from Davis so that medical personnel could provide treatment. Pritchett called for aid and moved Davis to a location where aid could be provided. Fire department medics, who had been waiting outside entered and performed lifesaving measures. Medics were unable to revive Davis.

On January 3, 2018, the estate filed a wrongful death action against King County, Pritchett, Lewis, former King County Sheriff Urquhart and Sheriff Johanknecht[2] for negligence, battery, negligent use of excessive force, and outrage. King County moved for summary judgment to dismiss all of the estate's claims based on the felony bar statute, that the deputies had no legal duty to Davis, that Washington does not permit a

[2] Davis's estate voluntarily dismissed Johanknecht as a defendant.

negligent investigation against police, the deputies' actions were intentional, justified, and reasonable, the facts do not support a claim for battery because the deputies were justified in using deadly force when confronted with a deadly threat, and the elements of outrage could not be met. The estate responded that RCW 4.24.40 required a felony conviction or admission by the plaintiff and that Davis was accused of committing assault in the first degree, which requires specific intent to cause bodily harm or an apprehension of bodily harm. At oral argument, the estate argued that "the jury could infer that [Davis] didn't intend to create this apprehension—the specific intent to create an apprehension of bodily harm" but did not present facts creating an issue of fact that Davis pointed her gun at the deputies.

The trial court granted summary judgment in favor of the defendants, concluding that, while there may be disputes of material fact related to the reasonableness of the deputies' conduct, RCW 4.24.420 barred Davis's action. The estate appeals.

II.

"We review summary judgment motions de novo, engaging in the same inquiry as the trial court." Vargas v. Inland Washington, LLC, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019). "When reviewing summary judgment motions, we consider all disputed facts in the light most favorable to the nonmoving party." Vargas, 194 Wn.2d at 728 (internal quotes omitted). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." CR 56. Estate of Lee ex rel. Lee v. City of Spokane, 101 Wn. App. 158, 166, 2 P.3d 979 (2000).

At issue in this appeal is whether the felony bar statute, RCW 4.24.420, bars the estate's action. RCW 4.24.420 provides that

> [i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

Before addressing each of the estate's arguments, we acknowledge that Davis's death is tragic and echo the trial court's sentiment that the application of RCW 4.24.420 here is problematic because it precludes claims where law enforcement officers' actions and training may have been unreasonable, given their knowledge that the individual they were confronting was suicidal and armed. RCW 4.24.420 prevents courts and juries from reaching the issue of whether law enforcement's negligence resulted in the loss of life. The statute is clear and precludes our evaluation of these policy questions.

A.

The estate contends that only a jury may infer, from circumstantial evidence, the requisite specific intent that the decedent was "engaged in the commission of a felony" and therefore, the trial court erred in granting summary judgment because it infringed upon the jury's province. We disagree.

RCW 9A.36.021(1)(c) provides that "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another with a deadly weapon." RCW 9A.36.031 provides "[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: (g) Assaults a law

enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault."

The statute does not define "assault;" thus, we look to the common law definition. State v. Abuan, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). "Washington recognizes three common law definitions of 'assault': '(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.'" Abuan, 161 Wn. App. at 154 (citing State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). Finally, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 369 (1995).

The estate identifies the following factors for why there is a dispute about whether Davis formed the requisite intent for assault in the second or third degree: "her mental state, history of depression and abuse, pre-shooting statements and conduct, suicidal ideation, the unloaded gun, personal history and characteristics, as well as the Deputies' own negligent conduct, pre-shooting tactical errors, and completely unnecessary and rushed confrontation of [Davis] at gunpoint in her bedroom less than a minute after entering her home."

But, even viewing these facts in the light most favorable to Davis, there is no dispute that both officers testified that Davis raised and pointed the gun directly at them before they shot. The act of pointing a gun at someone supports a determination that there was an intent to create apprehension of bodily injury. The trial court did not err when it concluded that there was not a dispute of material fact about whether Davis

formed the requisite intent to find that she was engaged in the commission of a felony at the time of her death.

B.

The estate next contends that only a jury can weigh evidence and make credibility determinations and that the trial court erred by invading the jury's exclusive province by inferring specific intent from the circumstantial evidence. We disagree.

"It is true that a court should not resolve a genuine issue of credibility at a summary judgment hearing." Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991). "An issue of credibility is present only if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue." Howell, 117 Wn.2d at 626. "A party may not preclude summary judgment by merely raising argument and inference on collateral matters." Howell, 117 Wn.2d at 626-27.

> The party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

Amend v. Bell, 89 Wn.2d 124, 127, 570 P.2d 138 (1977).

There is no evidence suggesting that Davis did not point her gun at the deputies. Instead, the estate contends "[b]ecause a reasonable juror could conclude that because the involved officers lied about circumstances surrounding the shooting, and that therefore 'the officers also lied about the facts that would support their claim that [Davis] posed an imminent threat of harm,' summary judgment was inappropriate." The estate cites an unpublished decision from the United States District Court for the Central

District of California, J.J.D. v. City of Torrence, No. CV 14-07463-BRO, 2016 WL 6674996, at *5 (C.D. Cal. Mar. 22, 2016) (court order), to support its argument. In that case, however, the officers had not provided an account of the shooting that matched the physical evidence. This created a dispute of material fact, from which a reasonable juror could conclude the officers had lied. Here, there is no physical evidence to suggest that Davis did not raise her gun or that the deputies lied. The estate points to small inconsistencies in the deputies' version of events, including how Davis was holding the gun, and how the gun was handled after the shooting. These inconsistencies are insufficient to create a dispute of material fact on the issue of whether Davis raised her gun. There is no evidence that the gun was planted or not in Davis's immediate possession at the time of the shooting. Thus, the trial court did not err when it granted summary judgment because there was no genuine issue of material fact.

C.

The estate next contends that the trial court erred when it granted summary judgment under RCW 4.24.420 because there must be a felony conviction or admission to felonious conduct before the court can bar a wrongful death action under RCW 4.24.420. We disagree.

We review statutory interpretation de novo. Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). "The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature." Tesoro, 173 Wn.2d at 556. First, we look to the statute's plain language and if the language is unambiguous, our inquiry ends. State v. Armendariz, 160 Wn.2d

106, 110, 156 P.3d 201 (2007). "The statute is to be enforced in accordance with its plain meaning." Armendariz, 160 Wn.2d at 110. "Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous." When a statute's language is ambiguous, we may resort to legislative history to discern legislative intent. Armendariz, 160 Wn.2d at 110-11.

Here, the statute's language is unambiguous. The plain language of the statute does not require that a person be convicted of a felony or admit to felonious conduct before RCW 4.24.420 is a complete defense to a civil action. Instead, the language states "[i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony." RCW 4.24.420 (emphasis added). A wrongful death action will likely never involve a conviction or admission to felonious conduct because the death would proceed any possible trial or admission. When possible, we "give effect to every word, clause and sentence of a statute." Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). The argument advanced by the estate reads the language "wrongful death" out of the statute by making the defense unavailable in almost all wrongful death actions. We read the statute to specifically contemplate its applicability in wrongful death actions.

The trial court did not err by applying RCW 4.24.420 on summary judgment when there was no criminal conviction or admission to felonious conduct.

D.

Finally, the estate contends that the trial court erred in granting summary judgment because there is a dispute of material fact on the issue of causation. We disagree.

Proximate cause is generally a question for the jury, but it is a question of law "when the facts are undisputed and the influences therefrom are plain and incapable of reasonable doubt or difference of opinion." Graham v. Public Emps. Mut. Ins. Co., 98 Wn.2d 533, 539, 656 P.3d 1077 (1983). Proximate cause consists of two elements: cause in fact and legal causation. Sluman v. State, 3 Wn. App. 2d 656, 701, 418 P.3d 125 (2018). Cause in fact concerns the "but for" consequences of an act: those events that the act produced in a direct, unbroken sequence, and that would not have resulted had the act not occurred. Sluman, 3 Wn. App.2d at 701. "Legal causation rests on considerations of logic, common sense, policy, justice, and precedent as to how far the defendant's responsibility for the consequences of its actions should extend." Sluman, 3 Wn. App. 2d at 701. "The inquiry is whether a reasonable person could conclude that there is a greater probability that the conduct in question was the proximate cause of the plaintiff's injury than there is that it was not." Mehlert v. Baseball of Seattle, 1 Wn. App. 2d 115, 118-19, 404 P.3d 97 (2017).

Even if the estate is correct, and the deputies' response was not appropriate given the circumstances and what they knew about Davis during the encounter, that is not the issue before us. Instead, we are asked whether Davis's commission of a felony was a proximate cause of her death. For proximate cause, we look at the unbroken sequence of events, from the felonious conduct to the injury. The statute does not take

into account the deputies' conduct prior to the felonious conduct. The statute states it is a complete defense when "the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death." RCW 4.24.420. Thus, our inquiry concerns Davis's conduct and whether it was a proximate cause of her death. Viewing the facts in the light most favorable to Davis, there are no facts to support that she did not point her gun at the deputies. But for her conduct, the deputies would not have shot Davis. There is no dispute of material fact on the issue of causation because there are no facts to support that Davis did not raise her gun. The trial court did not err.

The opinion of the estate's law enforcement expert, Leo Poort does not create a dispute of material fact on the issue of causation. Poort concluded that the deputies

> acted without proper cause or justification in fatally shooting [Davis] who was known by the deputies to be suicidal. Lewis and Pritchett far fell below the applicable standard of care here, and did not act as reasonable Sheriff's Deputies. Indeed, it would have been obvious to any Sheriff Deputy exercising his or her professional judgment that the acts taken by Lewis and Pritchett would put [Davis] at an unnecessary risk of serious harm and/or death.
>
> I have also concluded, to a reasonable degree of professional certainty, that the KCSO through its failure to adequately train and supervise its deputies, created an environment where the conduct of these deputies on October 21, 2016 was excessive. The deputies loudly entered [Davis's] home and forcibly entered her bedroom, thereby precipitating a fatal confrontation with the suicidal [Davis]. The KCSO far fell below the applicable standard of care here. Indeed, it would have been obvious to any Chief or Sheriff exercising his or professional judgment that KCSO's failure to train and supervise would result in suicidal persons, such as [Davis], at additional and unnecessary risk of serious harm and/or death.

Rather than opine on Davis's actions, Poort's opinion focuses on the negligent conduct of the deputies. The issue of the deputies' negligence, however, is a separate

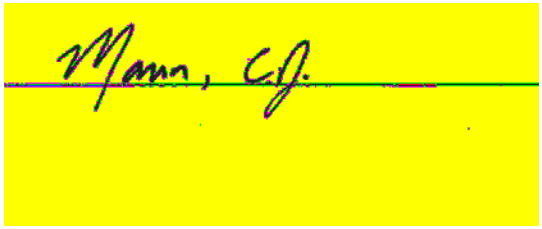
issue from whether the felony bar statute acts as a complete defense to any negligence claim, regardless of whether the elements of negligence are met. It is not enough to show that the deputies were independently negligent, the estate must show that facts exist to establish a dispute of material fact as to whether Davis pointed her gun at the deputies.

Additionally, the estate cannot show that, had the deputies acted differently, that Davis would not have still pointed her gun at them upon entering the room. When the estate's police practice's expert, D.P. Van Blaricom, was deposed, he was asked if he agreed that the deputies acted appropriately once Davis pointed a gun at them. Van Blaricom responded that "if someone points a gun at you, you may shoot them" and there would be no way to safely know whether a gun was loaded. Without facts demonstrating the possibility that Davis did not point her gun at deputies, the estate cannot create a dispute of material fact sufficient to overcome the felony bar statute.

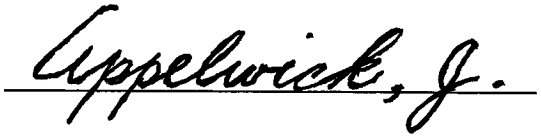
Finally, the language of RCW 4.24.420 indicates that it applies if "the felony was a proximate cause of the injury or death." (Emphasis added). Washington courts have long recognized that there can be more than one proximate cause of an injury and that the plaintiff should not be forced to prove that the defendant's negligence was the sole cause of the injury. Mehlert, 1 Wn. App. 2d at 118; N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 378 P.3d 162 (2016). The statute only requires a defendant show that the felony was a proximate cause of the injury or death, not the only proximate cause. Thus, while there may be multiple causes of a plaintiff's injury, a defendant need only show that the felony was a cause for the felony bar statute to apply as a complete defense. Since the estate was unable to present any evidence to create a dispute of material fact as to

whether Davis pointed her gun at the deputies, there is no dispute of material fact on the issue of causation under RCW 4.24.420.

We affirm.



WE CONCUR:



(c) "Law enforcement officer" means a member of the state patrol, a sheriff or deputy sheriff, or a member of the police force of a city, town, university, state college, or port district, or a fish and wildlife officer or ex officio fish and wildlife officer as defined in RCW 77.08.010. [2001 c 253 § 1; 1997 c 206 § 1; 1984 c 133 § 2; 1977 ex.s. c 158 § 1.]

Legislative findings—1984 c 133: "The legislature finds that a growing number of unfounded lawsuits, claims, and liens are filed against law enforcement officers, prosecuting authorities, and judges, and against their property, having the purpose and effect of deterring those officers in the exercise of their discretion and inhibiting the performance of their public duties.

The legislature also finds that the cost of defending against such unfounded suits, claims and liens is severely burdensome to such officers, and also to the state and the various cities and counties of the state. The purpose of section 2 of this 1984 act is to provide a remedy to those public officers and to the public." [1984 c 133 § 1.]

Construction—1984 c 133: "The provisions of section 2 of this 1984 act are remedial and shall be liberally construed." [1984 c 133 § 3.]

Severability—1984 c 133: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1984 c 133 § 4.]

4.24.360 Construction contract provision waiving, releasing, etc., rights of contractor, etc., to damages or adjustment for unreasonable delay caused by contractee, etc.—Declared void and unenforceable—Exceptions. Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.

This section shall not be construed to void any provision in a construction contract, as defined in RCW 4.24.370, which (1) requires notice of delays, (2) provides for arbitration or other procedure for settlement, or (3) provides for reasonable liquidated damages. [1979 ex.s. c 264 § 1.]

4.24.370 Construction contract provision waiving, releasing, etc., rights of contractor, etc., to damages or adjustment for unreasonable delay caused by contractee, etc.—"Construction contract" defined. "Construction contract" for purposes of RCW 4.24.360 means any contract or agreement for the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith. [1979 ex.s. c 264 § 2.]

4.24.380 Construction contract provision waiving, releasing, etc., rights of contractor, etc., to damages or adjustment for unreasonable delay caused by contractee, etc.—Prospective application of RCW 4.24.360. The provisions of RCW 4.24.360 shall apply to contracts or agreements entered into after September 1, 1979. [1979 ex.s. c 264 § 3.]

4.24.400 Building warden assisting others to evacuate building or attempting to control hazard—Immunity from liability. No building warden, who acts in good faith, with or without compensation, shall be personally liable for civil damages arising from his or her negligent acts or omissions during the course of assigned duties in assisting others to evacuate industrial, commercial, governmental or multi-unit residential buildings or in attempting to control or alleviate a hazard to the building or its occupants caused by fire, earthquake or other threat to life or limb. The term "building warden" means an individual who is assigned to take charge of the occupants on a floor or in an area of a building during an emergency in accordance with a predetermined fire safety or evacuation plan; and/or an individual selected by a municipal fire chief or the chief of the Washington state patrol, through the director of fire protection, after an emergency is in progress to assist in evacuating the occupants of such a building or providing for their safety. This section shall not apply to any acts or omissions constituting gross negligence or wilful or wanton misconduct. [1995 c 369 § 2; 1986 c 266 § 79; 1981 c 320 § 1.]

Effective date—1995 c 369: See note following RCW 43.43.930.

Severability—1986 c 266: See note following RCW 38.52.005.

4.24.405 Action for malicious harassment of another because of race, color, religion, ancestry or national origin. See RCW 9A.36.080.

4.24.410 Dog handler using dog in line of duty—Immunity. (1) As used in this section:

(a) "Police dog" means a dog used by a law enforcement agency specially trained for law enforcement work and under the control of a dog handler.

(b) "Accelerant detection dog" means a dog used exclusively for accelerant detection by the state fire marshal or a fire department and under the control of the state fire marshal or his or her designee or a fire department handler.

(c) "Dog handler" means a law enforcement officer who has successfully completed training as prescribed by the Washington state criminal justice training commission in police dog handling, or in the case of an accelerant detection dog, the state fire marshal's designee or an employee of the fire department authorized by the fire chief to be the dog's handler.

(2) Any dog handler who uses a police dog in the line of duty in good faith is immune from civil action for damages arising out of such use of the police dog or accelerant detection dog. [1993 c 180 § 1; 1989 c 26 § 1; 1982 c 22 § 1.]

4.24.420 Action by person committing a felony—Defense—Actions under 42 U.S.C. Sec. 1983. It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983. [1987 c 212 § 901; 1986 c 305 § 501.]

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

GALANDA BROADMAN

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